

**BEFORE THE INDIANA ALCOHOL & TOBACCO COMMISSION**

**IN THE MATTER OF  
THE PERMIT OF:**

**KOCOLENE MARKETING, LLC  
309 N.W. A STREET  
LINTON, INDIANA 47441**

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**PERMIT NO. DL28-94299**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

The Applicant, Kocolene Marketing, LLC (“Applicant” or “Kocolene”), 309 N.W. A Street, Linton, Indiana 47441, filed its application for a renewal of a type 115 Indiana Alcohol and Tobacco Commission (“ATC”) permit, permit #DL28-94299, on or about November 19, 2003. This application was assigned to the Greene County Local Board (“LB”) for their investigation and recommendation. On February 5, 2004, the LB voted by a 3-0 vote to recommend denial of this application, stating as its reasons that the Applicant had not satisfied the terms of an agreement with the ATC. The recommendation of the LB was adopted by the ABC at its April 20, 2004 meeting and said application was denied.

The Applicant, by its attorney, Matthew M. Price, filed a timely notice of appeal of this ATC action. The matter was set for hearing and was heard by U-Jung Choe, Hearing Judge (“HJ”) on April 6, 2005. At that time, witnesses were sworn, testimony was heard, evidence was received and the matter was taken under advisement. The HJ now submits to the ATC her Proposed Findings of Fact and Conclusions of Law for the ATC's consideration.

Additional background information relevant to the decision on this matter is as follows:

On August 7, 2002, Kocolene filed its Application for Renewal of 2002 Alcoholic Beverage Permit concerning the subject permit. Kocolene has held that subject permit at this location since October 10, 1998. The local board hearing related to, but not directly involving, the current appeal was originally held on November 6, 2002 before the Greene County Local Board. It received a recommendation of approval by a vote of 3 to 1 in favor of renewing the permit. The ATC remanded the permit to the Greene County Local Board by a decision of November 19, 2002.

Following the remand, Kocolene appeared in person at two subsequent local board hearings and offered additional testimony and evidence in support of the requested renewal. Specifically, the Greene County local board heard testimony and received evidence concerning Kocolene's qualifications to continue to hold its Type 115 permit at local board hearings on March 4, 2003 and again on April 2, 2003. The proceedings on March 4, 2003 were marked by substantial confusion concerning the purpose for the additional proceedings before that body. Kocolene learned at the March 4, 2003, local board hearing that the minutes of the November 19, 2002 ATC meeting indicated that the local board "needs to provide findings to the ATC by asking for sales figures or proof that this is a grocery store and not a tobacco store." However, the notice of the remand sent to Kocolene dated November 20, 2002 stated, in pertinent part, that the "local board [is to] specifically investigate whether the permittee is still qualified to hold an alcoholic beverage permit, pursuant to I.C. 7.1-3-23-12." The notice of remand made no reference to sales figures or the term "tobacco store."

At the conclusion of the March 4, 2003 local board hearing, the board approved a motion to continue the proceedings until either Kocolene provided sales figures

establishing that it continued to operate a grocery store or the local board received additional guidance from the ATC as to the purposes for the additional proceedings before the local board.

By memorandum dated March 12, 2003, the ATC did provide additional guidance respecting the additional proceedings. This guidance specifically referenced findings of fact and conclusions of law from a recent administrative decision involving Thornton Oil Corporation. This additional guidance was the focus of the local board hearing on April 2, 2003. Kocolene presented additional testimony concerning its operations, including evidence of its total grocery sales since the start of its then-current fiscal year on October 1, 2002. As a part of the April 2, 2003 hearing, Kocolene submitted proposed Findings of Fact following the Findings adopted in the Thornton Oil case that the ATC provided to the local board to use as a guide. With respect to each Finding, Kocolene either compared favorably or otherwise exceeded the standards established by the Thornton case for Kocolene's location in Linton, Indiana.

At the conclusion of the April 2, 2003 local board hearing, the board voted on a motion made by Mr. Patterson (a member of the local board). The motion was stated in the negative (i.e., a motion not to renew), and it garnered votes from only two out of the four members of the local board. The other two members of the board voted against the motion not to renew. Accordingly, the motion failed to garner a majority vote of the board and, therefore, failed. A local board may take action only upon the affirmative vote of at least three of its members. The only action of the local board which garnered a majority vote of local board members was the original action taken on November 6, 2002, which action recommended renewal of the permit. The only dissenting member

from the November 6 local board hearing (Officer Brian Stewart) changed his position at the meeting on April 2, 2003, and he later offered a written opinion in support of Kocolene's permit renewal.

## **II. EVIDENCE AT THE HEARING**

A. The following individual testified before the ATC in favor of the Applicant in this cause:

1. Robert R. Myers ("Myers"), Chairman and Chief Executive Officer of the Applicant.

B. The following exhibits were introduced and admitted before the ATC in favor of the Applicant:

1. Applicant's Exhibit 4, Letter of 1/6/04 to Officer Brian Stewart from Matthew M. Price.

2. Applicant's Exhibit 5, National Association of Convenience Stores identification of typical convenience store characteristics and listings of product units at subject location.

3. Applicant's Exhibit 6, Letter of 7/15/03 to Mary L. DePrez from Matthew M. Price.

4. Applicant's Exhibit 7, Letter of 9/22/03 to Officer Brian J. Stewart from James L. Davis.

5. Applicant's Exhibit 9, Newspaper advertisement of grocery items at subject store, dated February 12, 2004.

6. Applicant's Exhibit 10, Copy of Trial Court decision in Kocolene Oil Corporation v. Indiana Alcoholic Beverage Commission, Cause NO. CV781-322, dated May 25, 1984.

C. Remonstrators testifying against Applicant at ATC:

None.

D. The following exhibits were introduced and admitted before the ATC in support of the Remonstrator:

None.

### **III. PROPOSED FINDINGS OF FACT**

1. The Applicant, Kocolene Marketing, LLC ("Applicant"), 309 N.W. A Street, Linton, Indiana 47441, filed its application for renewal of a type 115 Indiana Alcohol Commission ("ATC") permit, permit #DL28-94299, on or about November 19, 2003. (ATC file)

2. Kocolene operates sixteen (16) similar convenience grocery stores in Indiana which hold ATC beer and wine permits. (ATC file; Testimony of Myers)

3. Kocolene has an excellent record of complying with Indiana's alcoholic beverage laws, having received only one (1) citation ever (a sale to a minor who produced a fake I.D.) in connection with the operation of its stores in Indiana. (ATC file; Testimony of Myers)

4. Kocolene has rigorous internal procedures for assuring compliance with Indiana's alcoholic beverage laws, and a member of the Greene County local board noted, in this regard, that "I pretty well guarantee that no one under age is being caught

buying beer in that store because they card every customer. I mean you run your business well.” (LB transcripts; Testimony of Myers)

5. Kocolene’s store at this location in Linton has been in operation for over seven years.

6. Kocolene advertises grocery items on the premises, by newspaper ads and by direct mail. (Testimony of Myers; Applicant’s Exhibit 9).

7. At this Linton, Indiana location, Kocolene sells products typically sold in Indiana grocery stores including bakery goods, dairy products, milk, cheese, cereal, canned foods, bread, health and beauty aids, toiletries, juices, soft drinks, paper products, chips, and candy. (ATC files; LB proceeding transcript)

8. Kocolene’s marketing plan is to emphasize the sale of tobacco, while offering for sale the top 200 items sold in various convenience grocery stores around the country. Kocolene also stocks its grocery operations to meet evolving customer demands. (LB Proceeding Transcripts; Testimony of Myers)

9. Kocolene has provided detailed evidence and testimony since its appearance before the Greene County local board in November, 2002 indicating that its grocery sales are a substantial and significant part of Kocolene’s business operation and further indicating that since April, 2003 it has only added to its grocery inventory. (ATC files; LB Proceeding transcripts; Testimony of Myers)

10. At this Linton, Indiana location, Kocolene’s net profit attributable to grocery sales is 100%. (LB Proceeding Transcripts; ATC File)

11. At this Linton, Indiana location, 100% of the inventory is in grocery items. (LB Proceeding Transcripts; ATC File)

12. At this Linton, Indiana location, Kocolene's convenience grocery store building is approximately 2,400 square feet. (LB Proceeding Transcripts; ATC File)

13. At this Linton, Indiana location, 95% of the leasehold improvements are attributable to the grocery operation. (LB Proceeding Transcripts; ATC File)

14. At this Linton, Indiana location, Kocolene's total annual grocery sales easily exceed \$1,000,000. (LB Proceeding Transcripts; ATC File)

15. At this Linton, Indiana location, the gross sales of grocery items represent 100% of the operation's total sales. (LB Proceeding Transcripts; ATC File)

16. At this Linton, Indiana location, Kocolene markets itself as "Fast Max/Smokers Host" and advertises its grocery items. (LB Proceeding Transcripts; ATC File)

17. This location is a similar operation to the other sixteen (16) Kocolene stores that hold alcoholic beverage permits in Indiana, with virtually the same variety product offerings at each location (except for pet food, fountain drinks and frozen food). (LB Proceeding Transcripts; ATC File)

18. Kocolene's stores are similar to competitor stores holding alcoholic beverage permits in Indiana. (LB Proceeding Transcripts; ATC File)

19. At this Linton, Indiana location, Kocolene provides ample parking for customers to purchase grocery items. (LB Proceeding Transcripts; ATC File)

20. This location is a very similar operation to Kocolene's other Linton, Indiana store, with identical product offerings, except for pet food, fountain drinks and frozen foods. (LB Proceeding Transcripts; ATC File)

21. This location differs from Kocolene's other Linton, Indiana store only with respect to the number of certain grocery item facings (*e.g.*, this location may have 3 bottles of ketchup, while the other Linton store will have a few more bottles). The number and variety of product offerings at each location is essentially identical, with locations in Linton, Indiana having a greater than 98% product overlap. (LB Proceeding Transcripts; ATC File)

22. There are approximately 500 convenience grocery stores in Indiana which hold alcoholic beverage permits. (LB Proceeding Transcripts; ATC File)

23. Kocolene desires to be able to continue to compete on a level playing field with other convenience grocery stores that sell alcoholic beverages in Indiana. (LB Proceeding Transcripts; ATC File)

24. At this Linton, Indiana location, Kocolene employs extensive security policies, procedures, and equipment. (LB Proceeding Transcripts; ATC File)

25. More than 200 customers of Kocolene at this location signed petitions in less than a one-week period stating their support for the renewal of Kocolene's permit and evidencing the continued need for an alcoholic beverage permit at this location. (LB Proceeding Transcripts; ATC File)

26. Kocolene is committed to further expanding its grocery operation in the future in response to evolving customer demands. (LB Proceeding Transcripts; ATC File)

27. Kocolene's has no problems with increased criminal activity, loitering, theft, or police activity at its nineteen (19) locations in Indiana that sell alcoholic beverages. (LB Proceeding Transcripts; ATC File)



28. No residents of Linton, Indiana, except for an attorney believed to be representing a person affiliated with a competitor holding a package liquor store permit, appeared and remonstrated against Kocolene's renewal application during the 2002/2003 Greene County Local Board hearings. No remonstrator appeared during the 2004 Greene County Local Board meeting. (LB Proceeding Transcripts; ATC File)

29. The employees at this location are over 21 years of age. (LB Proceeding Transcripts; ATC File)

30. Absolutely no evidence has been presented either at the LB hearing or the ATC appeal hearing as to why this permit should not be issued, the Applicant has established its qualifications to hold a permit at this location and there is no legal basis or reason why this permit should not be granted. (LB hearing and ATC appeal hearing)

31. A Member of the Greene County Local board advised Kocolene's former store manager for this Linton, Indiana location that he would vote against Kocolene's permit renewal because Kocolene was an outsider competing with local business owners. (Testimony of Myers)

#### **IV. CONCLUSIONS OF LAW**

1. The Applicant, Kocolene Marketing, LLC ("Applicant"), 309 N.W. A Street, Linton, Indiana 47441, filed its application for renewal of a type 115 Indiana Alcoholic Beverage Commission ("ATC") permit, permit #DL28-94299, on or about November 11, 2003. (ATC file)

2. Kocolene is a fit and proper Applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.

3. No evidence has been submitted which would disqualify Kocolene Corporation from continuing to hold a Type 115 beer and wine permit at its 309 N.W. A Street, Linton, Indiana location.

4. There is a continuing need for a beer and wine permit at Kocolene's 309 N.W. A Street, Linton, Indiana location. 905 IAC 1-27-4(a).

5. The neighborhood and community desire to receive the service of an alcoholic beverage permit at Kocolene's 309 N.W. A Street, Linton, Indiana location. 905 IAC 1-27-4(b).

6. The beer and wine permit at Kocolene's 309 N.W. A Street, Linton, Indiana location will not negatively impact other businesses in the neighborhood or community. 905 IAC 1-27-4(c).

7. The beer and wine permit at Kocolene's 309 N.W. A Street, Linton, Indiana has not negatively impacted the neighboring community. 905 IAC 1-27-4(d).

8. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on in the premises is in the nature of the Applicant's main business function in the premises. I.C. 7.1-3-1-19.

9. The Commission may issue a beer and wine permit to an Applicant when a substantial portion of the Applicant's business in the premises is in the nature of a grocery store. I.C. 7.1-3-5-2; I.C. 7.1-3-1-19.

10. The phrase "in the nature of the applicant's main business function" as applied in I.C. 7.1-3-1-19 to grocery stores means the retail sale of products typically

found in an Indiana grocery store. *See Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

11. The term “grocery store,” in common usage, means a building or structure in which groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).

12. The word “substantial” as used in I.C. 7.1-3-1-19 means something more than a nominal amount, something more than seeming or imaginary, but does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

13. The phrase “in the premises” as used in I.C. 7.1-3-1-19 means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. I.C. 7.1-1-3-20.

14. The Applicant has established that a substantial portion of its business in the premises is in the nature of a grocery store. (ATC files, LB hearing and ATC appeal hearing).

15. The Applicant has submitted substantial evidence that it, in fact, meets the character of business test for a grocery store and is qualified to continue to hold an ATC Type 115 beer and wine permit. (ATC Files, LB hearing and ATC appeal hearing).

16. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

17. To deny Kocolene's application while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. I.C. 7.1-3-19-11.

18. The LB denied this application without sufficient evidence that would support a finding that this permit should not be issued. (LB Proceeding Transcripts).

19. The LB Vote in 2004 reconvening nonrenewal of Kocolene's permit was not based on its failure to continue to possess the qualifications for such a permit, but rather was based on the premise that Kocolene had failed to adhere to the terms of a contract with the ATC. The ATC has failed to identify any objective standard or requirement that Kocolene does not hold preventing its permit at this location from being renewed. There is no legal basis for denying renewal of Kocolene's permit.

20. The initial findings of the LB were: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. IC 7.1-3-19-11. There was no compelling substantial evidence against the renewal of this permit at either the LB hearing or the appeal hearing. Denying renewal of this application cannot be supported by substantial evidence.

21. The only evidence presented at the LB hearing or at the ATC appeal hearing is in support of the Applicant continuing to hold this permit and there is no dispute as to the legal qualifications of the Applicant to hold the applied for permit at the proposed location.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the application of the Applicant, Kocolene Marketing, LLC, 309 N.W. A Street, Linton, Indiana 47441, for renewal of ATC type 115 permit, permit #DL28-94299, should be, and the same hereby is, granted and the appeal of the Applicant from the recommended denial by the LB is reversed and the application for renewal of said permit by the Applicant is hereby granted.

Dated \_\_\_\_\_

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U-Jung Choe, Hearing Judge